79917-2

NO. 23986-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

BRENT RICHARD SMITH,

Defendant/Appellant.

APPELLANT'S BRIEF

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1. The trial court's Conclusions of Law 2 and 3 (Supp. CP 89; Appendix "A") are not supported by its Findings of Fact.

2. The emergency exception to the search warrant requirement is inapplicable under the facts and circumstances of this case.

3. The trial court should have granted the CrR 3.6 motion and suppressed the evidence.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Do the trial court's Findings of Fact support Conclusions of Law 2 and 3?

2. Were there sufficient facts presented at the CrR 3.6 hearing to support the trial court's determination that the State established the emergency exception to the search warrant requirement?

3. Were Brent Richard Smith's rights under the Fourth Amendment to the United States Constitution and Const. art. I, § 7 violated by the warrantless search of the house?

STATEMENT OF THE CASE

An Information was filed on November 23, 2004 charging Mr. Smith with manufacturing methamphetamine. (CP 79)

A CrR 3.6 hearing was conducted on January 21, 2005. Detective Gonzalez from the Benton County Sheriff's Office testified at the hearing. (01/21/05 RP 12, ll. 15-17; ll. 19-21)

The local Crime Stoppers line had received an anonymous tip: an anhydrous ammonia truck which had been stolen in Sprague, Washington was located at either 203212 or 203260 East SR-397 near Finley, Washington. The FBI received the same anonymous tip. (01/21/05 RP 14, ll. 3-25)

Approximately fifteen (15) officers responded to the area. The truck was located near a house on approximately one (1) acre of fenced ground. (01/21/05 RP 16, ll. 10-16)

Detective Gonzalez approached the truck to determine if the tanks were leaking. He did not notice any leakage. (01/21/05 RP 17, ll. 17-22; RP 20, ll. 10-14)

Other officers contacted the house. It appeared vacant. There were boards on the windows. The anonymous tip received by Crime Stoppers also indicated the house was vacant. (01/21/05 RP 18, l. 23 to RP 19, l. 5; RP 19, ll. 23-24)

A mattress, rifle and dog were seen inside the house. (01/21/05 RP 21, ll. 2-5)

A propane tank with a discolored valve was found near a shed on the property. (01/21/05 RP 21, ll. 12-18)

The officers knocked on the door. After a short period of time Mr. Smith, Kimberly Breuer and the dog came out of the house. (01/21/05 RP 23, ll. 5-9)

When asked, Mr. Smith and Ms. Breuer stated that no one else was in the house. (01/21/05 RP 23, ll. 16-17)

The officers looked inside the house. They saw that the gun was no longer near the mattress. They decided to conduct a "protective sweep" of the house. (01/21/05 RP 23, ll. 18-25; RP 24, ll. 3-7)

The officers wanted to determine if anyone else was inside the house. They were concerned because anhydrous ammonia is a caustic gas and dangerous to the public. (01/21/05 RP 15, ll. 11-15; RP 24, ll. 17-19)

The officers did not have a search warrant. They seized a 16 gauge shotgun from a crawl space on the second floor of the house. No one else was found inside the house. While inside the house they observed a metal locker in the bathroom. It was identified as a methamphetamine lab by its odor. (01/21/05 RP 17, ll. 13-14; RP 25, l. 11 to RP 26, l. 3; RP 27, ll. 22-25)

A substance later identified as methamphetamine was located on a couch in the living room during the initial search. A van sitting outside

the house was also searched. Pseudoephedrine tablets, burnt foil and coffee filters were located in the van. (Trial RP 72, ll. 18-22; RP 73, ll. 23-25; RP 78, ll. 14-24)

The trial court denied the CrR 3.6 motion. It ruled that an emergency existed and that the initial entry into the house was justified. Findings of Fact and Conclusions of Law were subsequently entered on August 3, 2005. (01/21/05 RP 42, ll. 21 to RP 43, l. 4; Supp. CP 85-90)

The officers later obtained a search warrant and searched the house on November 19, 2004. They found:

1. A glass pipe with burnt residue in the living room near a backpack (Trial RP 113, ll. 10-14);
2. Miscellaneous used drug paraphernalia (Trial RP 113, ll. 21-24);
3. Documents with Mr. Smith's name on them inside the backpack (Trial RP 115, ll. 2-21);
4. Ibuprofen and pseudoephedrine tablets inside the backpack (Trial RP 126, ll. 21-22; ll. 24-25);
5. A propane tank and a bag of rock salt in the bathroom next to the metal locker (Trial RP 29, ll. 5-8);
6. A duffle bag with an ammonia tank inside it in the living room (Trial RP 44, ll. 1-2);
7. A hot plate (heat source) in the living room (Trial RP 55, ll. 15-20);

8. Gallons of liquids, jars, xylene, and lithium batteries inside the metal locker (Trial RP 31, ll. 16-19; RP 38, ll. 2-6); and

9. A key to the locker was found inside the backpack after the lock was cut off (Trial RP 40, ll. 10-19).

Testimony from Matthew Jorgensen of the Washington State Patrol Crime Lab indicated that all three (3) stages of methamphetamine production were present in the metal locker. (Trial RP 170, l. 16 to RP 174, l. 24)

A jury found Mr. Smith guilty of manufacturing meth-amphetamine. (CP 29)

Judgment and Sentence was entered on April 1, 2005. (CP 8)

Mr. Smith filed a Notice of Appeal on April 4, 2005. (CP 5)

SUMMARY OF ARGUMENT

The trial court erroneously determined that the emergency exception to the search warrant requirement applied.

The warrantless search of the house violated Mr. Smith's right to be free from an unreasonable search and seizure under the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

The "protective sweep" exception to the search warrant requirement cannot be justified based upon the facts and circumstances of this case.

The trial court should have granted Mr. Smith's CrR 3.6 motion and suppressed the evidence.

ARGUMENT

WARRANTLESS SEARCH

> A warrantless search is "per se unreasonable" and can be justified only if it falls within one of the "'jealously and carefully drawn'" exceptions to the Fourth Amendment warrant requirement. *Sanders* [*Arkansas v. Sanders,* 442 U.S. 753, 759-60, 61 L. Ed.2d 235, 99 S. Ct. 2586 (1979)]; *State v. Houser,* 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). The burden is upon the State to show that a warrantless search or seizure falls within one of these exceptions. *See Sanders,* at 760; *Houser,* at 149.

State v. Simpson, 95 Wn.2d 170, 188, 622 P.2d 1199 (1980).

The State argued the community caretaking function and the "protective sweep" exceptions to justify the warrantless search. Both excep-tions come within the ambit of the emergency exception to the search warrant requirement.

The trial court determined that the emergency exception applied when it entered Conclusions of Law 2 and 3. Mr. Smith does not contest

Conclusion of Law 1 which related to the truck and anhydrous ammonia tanks in the yard.

The trial court's Finding of Fact 6, 7, 9, 11, 12 and 13 (Supp. CP 87-89; Appendix "B") are the apparent basis for the trial court's Conclusion of Law 2 and 3.

A. Community Caretaking Function

> ... Washington cases ... have applied the community caretaking exception to search and seizure of automobiles, emergency aid situations, and routine checks on health and safety. *State v. Kinzy,* 141 Wn.2d 373, 386, 5 P.3d 668 (2000), *cert. denied,* 531 U.S. 1104 (2001).

State v. Schroeder, 109 Wn. App. 30, 37-38, 32 P.3d 1022 (2001).

No seizure of an automobile was involved in Mr. Smith's case.

Officers were not conducting a routine health and safety check. They wanted to recover a stolen anhydrous ammonia truck.

The officers had no information that there was anyone living on the property. There was no indication that emergency aid was required.

> The emergency aid exception recognizes the community caretaking function of the police to "'assist citizens and protect property.'" *State v. Johnson,* 104 Wn. App. 409, 414, 16 P.3d 680 (2001) (quoting *State v. Menz,* 75 Wn. App. 351, 353, 880 P.2d 48 (1994)). This exception applies when
>
> > "(1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to

> associate the need for assistance with the place searched."
>
> ... Further, two competing policies come into play when the emergency aid exception is invoked: "(1) allowing police to help people who are injured or in danger, and (2) protecting citizens against unreasonable searches." *Johnson,* 104 Wn. App. at 418 (citing *Menz,* 75 Wn. App. at 354-55). We balance these policies in light of the facts and circumstances of each case. *Johnson,* 104 Wn. App. at 418.

State v. Schroeder, supra, 38.

Mr. Smith contends that the emergency aid exception is inapplicable under the facts and circumstances of his case. There was no indication that anyone "likely needed assistance for health or safety reasons."

Mr. Smith told the officers that there was no one else inside the house.

The officers had no reason to believe that there was an individual inside the house in need of assistance.

The main reason the officers wanted to search the house was to locate the gun.

Thus, the community caretaking component portion of the emergency exception is not applicable.

B. Exigent Circumstances

The trial court, in Conclusions of Law 2 and 3, obviously tried to find the existence of exigent circumstances. However, there is an

insufficient factual basis under the designated Findings of Fact to justify a conclusion that exigent circumstances existed.

> There are 11 factors to consider in determining whether exigent circumstances existed to justify a warrantless police entry into a home: (1) a grave offense, particularly a crime of violence, is involved; (2) the suspect is reasonably believed to be armed; (3) there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) the suspect is likely to escape if not swiftly apprehended; (6) the entry is made peaceably; (7) hot pursuit; (8) fleeing suspect; (9) danger to arresting officer or to the public; (10) mobility of the vehicle; and (11) mobility or destruction of the evidence.

Seattle v. Altschuler, 53 Wn. App. 317, 320, 766 P.2d 518 (1989).

No crime of violence was involved.

Officers observed a gun, but neither Mr. Smith nor Ms. Breuer were armed when they came out of the house.

The officers believed the house was vacant. They were not looking for a suspect. Thus, they had no reason to believe that there was a suspect inside the house.

Since there was no suspect there was no likelihood of escape.

There was no fleeing suspect and thus no hot pursuit.

There was no vehicle involved. The officers had no idea that there was any evidence in the house which could be potentially destroyed.

Entry into the house was peaceable.

Detective Gonzalez testified that he believed there was potential danger.

Mr. Smith asserts that only two (2) of the eleven (11) *Altshculer* factors have any application to his case. These are factors (6) and (9).

The law is clear that an officer cannot conduct a search of a residence property in the absence of a search warrant.

RCW 10.79.040(1) states:

> It shall be unlawful for any policeman or any other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided.

RCW 10.79.040(1) must be interpreted in light of the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

Mr. Smith and Ms. Breuer came out of the house. They told the officers that no one else was present. They were unarmed. They were not under arrest. They were merely being detained.

> When a search extends beyond the limited area in the home of the suspect from which he might obtain weapons or evidentiary items, the Fourth Amendment protection against unreasonable searches and seizures requires that a search warrant be secured from an objective magistrate who must evaluate the "probable cause" affidavits of law enforcement in the light of the necessity that citizens be free from unreasonable searches and the privacy of the individual be safe from unwarranted invasion. *Vale v. Louisiana,* 399 U.S. 30, 26 L. Ed.2d 409, 90 S. Ct. 1969 (1970) and *Shipley v. California,*

> 395 U.S. 818, 23 L. Ed.2d 732, 89 S. Ct. 2053 (1969) ... .

State v. Peele, 10 Wn. App. 58, 62-63, 516 P.2d 788 (1973).

The officers expressed a personal safety concern. They also expressed a concern for potential danger if the anhydrous ammonia tank was ruptured by a rifle bullet.

Interestingly, the preferred method for destruction of propane tanks containing anhydrous ammonia is to fire a rifle bullet through them. (Trial RP 189, ll. 7-11; RP 190, ll. 17-20)

The *Altschuler* Court, quoting from *Welsh v. Wisconsin,* 466 U.S. 740, 753, 80 L. Ed.2d 732, 104 S. Ct. 2091 (1984) stated, *supra:*

> "... [A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense ... has been committed."

The officers did not see any offense being committed inside the house. They observed a gun, but were unaware of its connection to any crime.

Numerous Washington cases have condemned the exact type of warrantless search conducted in this case. *State v. Ramirez,* 49 Wn. App. 817, 746 P.2d 344 (1987) (probable cause to arrest for a misdemeanor offense together with the likelihood that evidence might be destroyed does not justify a warrantless and nonconsensual entry into a house to arrest the occupants under the exigent circumstances exception); *State v. Morgavi,*

58 Wn. App. 733, 794 P.2d 1289 (1990) (police having insufficient evidence to support an objective belief that a burglary has occurred are not presented with exigent circumstances and a warrantless seizure of marijuana plants inside the house was suppressed); *State v. Swenson,* 59 Wn. App. 586, 799 P.2d 1188 (1990) (police responding to a call of a house with an open door who called several times into the house, identifying themselves and asking if anyone was inside, and receiving no response, did not have sufficient probable cause to enter under the exigent circumstances exception); *State v. Muir,* 67 Wn. App. 149, 835 P.2d 1049 (1992) (police conducting a warrantless search of a house recently burglarized on the grounds of an emergency when there was no reasonable belief that there was anyone inside the house could not justify a search under the emergency exception to the search warrant requirement).

C. Protective Sweep

> While making a lawful arrest, officers may conduct a reasonable "protective sweep" of the premises for security purposes. *Maryland v. Buie,* 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed.2d 276 (1990). The scope of such a "sweep" is limited to a cursory visual inspection of places where a person may be hiding. *Id.* at 335. If the area immediately adjoins the place of arrest, the police need not justify their actions by establishing a concern for their safety. *Id.* at 334. However, when the "sweep" extends beyond this immediate area, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that

> the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.*

State v. Hopkins, 113 Wn. App. 954, 959-60, 55 P.3d 691 (2002).

As previously indicated, neither Mr. Smith nor Ms. Breuer were under arrest when the "protective sweep" was conducted. The Washington Courts have not extended the "protective sweep" exception to a mere detention. Thus, the "protective sweep" exception authorized in *Maryland v. Buie,* 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed.2d 276 (1990) does not apply.

Moreover, since the "protective sweep" involved the entire house, and Mr. Smith and Ms. Breuer had already come out of the house, the officers were required to articulate facts which would indicate a reasonable belief that there was someone else in the house posing a danger to the officers.

As clearly enunciated in *State v. Jeter,* 30 Wn. App. 360, 363, 634 P.2d 312 (1981):

> ... [A] concern for police safety **must be based upon prior knowledge** or direct observation **that the subject** of the search **keeps weapons *and*** that such person **has a known propensity to use them.**

(Emphasis supplied.)

No testimony was presented at the CrR 3.6 hearing to indicate that either Mr. Smith or Ms. Breuer were individuals known to keep weapons.

No testimony was presented at the CrR 3.6 hearing to indicate that either Mr. Smith or Ms. Breuer had a propensity to use weapons.

The fact of the matter is that the officers did not even know that Mr. Smith or Ms. Breuer were inside the house until after they came out.

Even though the *Jeter* case was a "knock and announce" case, it is applicable under the facts and circumstances of Mr. Smith's case. The State clearly did not present sufficient evidence of exigent circumstances to justify the "protective sweep" of the house.

"... [T]he question of whether self-protective actions of police are reasonable or necessary can be determined only on a case-by-case basis." *State v. Johnson,* 11 Wn. App. 311, 315, 522 P.2d 1179 (1974).

Mr. Smith contends that the officers knew the following facts:

1. A gun was observed through a window;
2. After Mr. Smith and Ms. Breuer came out of the house the gun could no longer be seen;
3. It took approximately ten (10) minutes for Mr. Smith and Ms. Breuer to come out of the house;
4. The officers were told that no one else was inside the house.

Division III of the Court of Appeals recently declined to extend the "protective sweep" exception to the execution of a search warrant. In *State v. Boyer,* 124 Wn. App. 593, 600-601 (2004), the Court determined that

> The concept of a protective sweep was adopted to justify the reasonable steps taken by arresting officers to ensure their safety while making an arrest. [Citation omitted.] Generally officers executing an arrest warrant may search the premises for the subject of that warrant but must call off the search as soon as the subject is found. ...
>
> To justify a protective sweep beyond immediately adjoining areas, the officer must be able to articulate "facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." [Citation omitted.] **The sweep is limited to a cursory inspection of places a person may be found and must last no longer than necessary to dispel the reasonable suspicion of danger *or* to complete the arrest, whichever occurs sooner. ...**
>
> In Washington ... the protective sweep has not been extended to the execution of search warrants.

(Emphasis supplied.)

The officers did not have a search warrant for the house.

Neither Mr. Smith nor Ms. Breuer were under arrest.

The officers were merely speculating that another person may be inside the residence with a gun.

As the *Hopkins* Court noted at 960:

> The only remaining possibility is that the officers feared that *other,* dangerous persons were in the shed or trailer. But a "general desire to be sure that no one is hiding in the place searched is not sufficient" to justify a

> protective sweep outside the immediate area where an arrest has occurred. *State v. Shaffer,* 133 Idaho 126, 131, 982 P.2d 961 (Ct. App. 1999); *see United States v. Ford,* 56 F.3d 265, 270 (D.C. Cir. 1995); *Runge v. State,* 701 So.2d 1182, 1186 (Fla. Dist. Ct. App. 1997); *Earley v. State,* 789 P.2d 374, 377 (Alaska Ct. App. 1990).

The trial court's Finding of Fact number 12 states:

> Detective Gonzalez testified that he was concerned **about the possibility of an individual with a weapon inside the residence** both as a threat of being shot and also as a threat that one of the task [*sic*] containing anhydrous ammonia, which would be pressurized, would be punctured. ...

(Emphasis supplied.)

Finding of Fact number 12 clearly indicates that Detective Gonzalez did not have a reasonable articulable suspicion that another person was inside the house with a gun. Finding of Fact 12 amounts to nothing more than an expression of the officer's desire to make certain that no one was hiding inside the house.

Defense counsel clearly and appropriately called the *Hopkins* case to the trial court's attention. The trial court's determination that the *Hopkins* case was inapplicable was error. (01/21/05 RP 10, ll. 6-16; RP 42, l. 21 to RP 44, l. 11)

Moreover, the subsequent issuance of the search warrant was contaminated by the officers' prior conduct.

> "Evidence which is the product of an unlawful search or seizure is not ad-

missible." *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed.2d 1081, 81 S. Ct. 1684, 84 A.L.R. 2d 933 (1961).

State v. Aranguren, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985).

Any and all evidence seized pursuant to the search warrant must also be suppressed. There were no factors independent of the initial warrantless search to support issuance of the search warrant.

CONCLUSION

The warrantless search of the house cannot be justified by the community caretaking function.

The warrantless search of the house was not authorized under the emergency exception to the search warrant requirement.

The warrantless search of the house was unauthorized under the "protective sweep" exception to the search warrant requirement.

The trial court's Conclusions of Law 2 and 3 are not supported by its Findings of Fact. Mr. Smith's CrR 3.6 motion should have been granted.

Mr. Smith requests the Court to reverse the denial of his suppression motion, suppress the evidence, and dismiss the case.

DATED this 4th day of January, 2006.

Respectfully submitted,

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APPENDIX "A"

2. The officers' entry into the residence to look for other individuals and the weapon was also an emergency exception to the warrant requirement.

3. The defense motion to suppress is denied.

APPENDIX "B"

6. At that time, other officers surrounded and contained, but did not enter the residence on the property. Officers knocked and announced their presence at the residence, and no one exited.

7. While containing the residence, Detective Brockman saw, through the window of the residence, what appeared to be a rifle. The apparent rifle was located in the living room area of the first floor next to a mattress.

9. After a period of time, approximately 10 minutes after the initial knock and announce the defendant, Brent Richard Smith, and Kimberly Yvonne Breuer, exited the residence with the white dog. Both the defendant and Smith were handcuffed and detained.

11. At this point, officer observed that the gun was no longer present in the living room.

12. Detective Gonzalez testified that he was concerned about the possibility of an individual with a weapon inside the residence both as a threat of being shot and also as a threat that one of the task containing anhydrous ammonia, which would be pressurized, would be punctured. Detective

Gonzales testified that he was aware that anhydrous ammonia can cause severe chemical burns in small amounts.

13. Officers entered the residence to do a safety sweep for additional individuals, and to locate the gun. During the safety sweep, officer located at 16 gauge shotgun in an upstairs crawlspace. Also during this safety sweep, officers observed items consistent with the manufacture of methamphetamine, and included this information in their application for a warrant. The warrant was granted, and a search of the residence revealed a methamphetamine laboratory.